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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1897.

MISSOURI, KANSAS AND TEXAS RAILWAY COMPANY,
Plaintiff in Error,
vs.
WILLIAM McCANN AND MILTON B. SMIZER, PARTNERS, UNDER THE NAME OF McCANN & SMIZER.

No. 161.

In Error to the Supreme Court of the State of Missouri.

SEPARATE ARGUMENT IN REPLY TO THE ARGUMENT OF PLAINTIFF IN ERROR.

By J. H. RODES,
Counsel for Defendant in Error.

IN THE

SUPREME COURT OF THE UNITED STATES.

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IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

SEPARATE ARGUMENT IN REPLY, BY J. H. RODES, FOR DEFENDANTS IN ERROR.

A reasonably careful analysis of the very elaborate argument of the plaintiff in error will not fail to discover a method of argument, by no means devoid of tact; a faculty which, though rare and valuable in an advocate, seems little adapted to the enlightenment of a court, which must measure accurately

both premises and the conclusion and again weigh both by the crucial test of pure logic and abstract reason. As much zeal seems to be employed in arguing from a false as from a true premise, and the argument is only rendered in a measure plausible from an adroitly concealed fallacy which doubtless the court would detect without aid, but which we feel constrained to endeavor to point out in the following

REPLY TO THE ARGUMENT OF PLAINTIFF IN ERROR.

We will first discuss the third point in counsel's brief in which the law is stated in two paragraphs, the first of which is as follows:

"III.

"In the absence of the statute in question, the carrier could lawfully contract against liability for loss or damage occurring on a connecting line, or occasioned by the negligence of a connecting carrier."

Certainly this proposition, as stated,is true, and the authorities cited in support of it are not questioned, but no conclusion can be drawn from them supporting the contention of the plaintiff in error, in the case at bar, for the proposition as above stated and the authorities cited, do not apply to a case like that under consideration.

Under this proposition counsel cites Hutchinson on Carriers, Sec. 149-b, where the rule is stated by the author as follows:

"The liability of the carrier beyond the terminus of his own route being thus a matter of contract, it is clear that he may pre-

vent all question of his liability by an express contract excluding it, and that such a contract will be enforced, even in those states where the rule in the Muscamp case prevails."

After stating this rule in the above language, this author cites in support of it as the leading cases, Myrick vs. R'y Co., 107 U. S., 102; Ill. Cent. R'y vs. Franklinberg, 54 Ill., 88; and Berg vs. R'y Co.. 30 Kan., 561.

Now, since the Myrick case is elsewhere liberally quoted from by counsel in his argument as supporting his right to make and enforce the contract made in this case, we will pause to consider what is there decided and differentiate it from the question now before the court. (1) The court decided upon the evidence that the carrier had not, in fact, contracted *to carry* the goods from Chicago to Philadelphia. The court says: "The receipt does not, on its face, import any bargain to carry the *freight through*. It does not say that the freight is to be transported to Philadelphia or that it was received for transportation there. It only says it is *consigned* to the order of Paris Myrick, and that the Blakers at Philadelphia are to be notified. And adds: 'Marked and described as above for transportation by the Michigan Central R'y to the warehouse at—— leaving the place blank. * * *. It cannot be assumed by the court, in the absence of evidence on that point, that it was intended for final destination of the cattle. On the margin of the receipt was the following: '*Notice*—see rules of transportation on the back hereof.'

"And among the rules is one declaring that the goods consigned to any place off the company's line, or beyond it, would be sent forward by the carrier or freightman, when there are such, in the usual manner, the company acting for such purpose as the agent of the consignor or consignee, and not as carrier, and the company would not be responsible for any loss, damage or injury to the property after the same should have been sent from its warehouse or station.

Though this rule, brought to the knowledge of the shipper,

might not limit the liability imposed by a specific through contract, yet, it would tend to rebut any inference of such a contract from the receipt of the goods marked for a place beyond the road of the company."

Thus, while it is seen that this case supports the doctrine announced in the first paragraph of point III on p. 11 of counsel's brief, and is also supported by the rule announced in Hutchinson on Carriers at Sec. 149-b, as cited by him, yet, neither the law as announced in the brief, nor the authorities cited thereunder, either support, or pretend to support, the proposition for which he is contending in this case.

No one can seriously deny that the carrier can lawfully contract against liability for loss or damage occurring on a connecting line, or against the negligence of a connecting carrier, and may do so in Missouri as freely as elsewhere, notwithstanding the statute; but, that is not the proposition here under consideration.

The question at bar is, can he by contract at once bind himself to the duty of carriage over the line of his connecting carrier and at the same time lawfully contract against liability over the line where he has undertaken to carry?

It is readily seen that these are two widely different propositions, resting upon entirely different principles, and concerning which directly opposite conclusions must be reached.

Thus, only by stating a part of the proposition involved, is counsel able to find authority in their support If the exact proposition involved had been stated, the very authority relied upon would have struck down the contention sought to be maintained in this case, for the court clearly intimates, that this rule

which declared a limitation of liability for loss or damage after the same had been forwarded, although brought home to the knowledge of the shipper, might not limit the liability imposed by a special through contract.

Again, Hutchinson on Carriers cites in support of the text, Ill. Central R'y vs. Frankenberg, 54 Ill., 88, and Berg vs. R'y Co., 30 Kan., 561.

In neither of which cases was there any contract by the receiving carrier to carry beyond its own road.

In the latter case the opinion of the court is rendered by Mr. Justice Brewer, then Judge of the Supreme Court of Kansas, where, there was not only no pretense of a through contract, but an express statement that the company would only carry over its own road and deliver to the next carrier for them to deliver to destination; and it was expressly stated that the company would not be responsible as a common carrier beyond its line. The court in the course of the opinion, remarks: "It will be borne in mind there is no express agreement to transport to Chicago," and that, as a matter of course, might, in all such cases limit liability to its own road.

So, also, the proposition of law announced in the second part of point III on p. 11 of counsel's brief, is but a horn-book principle of the law of carriers; and, yet, the principle is so stated as to seem, at first glance, to give some warrant of authority for the position for which counsel is contending; while the principle itself, and all the authorities cited in its support, manifestly, only relate to the duty and liability of carriers beyond their road, in those cases only, where the carrier has not by contract obligated himself to carry beyond his road.

None of them go to the extent of saying, or intimating, that the carrier does not become a common carrier beyond his road where he undertakes by contract to extend his duty and obligation of carriage over the road of the connecting carrier. The principle and the authorities cited only hold that a carrier is not a common carrier beyond his road, because he owes no duty or obligation by law to carry the goods beyond his line; but, it forms no warrant for saying that he is, or may become, a mere private carrier for hire beyond his own road, where he by contract, assumes an additional obligation of carriage which the law has not fastened upon him. For, when he assumes by contract to extend his functions as a carrier, and reap the advantages and receive the reward of a carrier beyond his line, he is then a common carrier over such other line, and if he reaps the rewards, he can not escape the burdens of a common carrier.

From the proposition as stated under point III, which is not denied; a specious, illogical and wholly false conclusion is reached by counsel on bottom p. 35, where he says:

"The fact that the transportation beyond the carrier's own line does not result from the operation of any general rule of public law, the fact that he is not required against his will to undertake the transportation beyond his line, shows that he is not a common carrier in the strict sense of the term. The test laid down to distinguish between a common carrier and a private carrier for hire is that the latter may undertake the transportation, or not, as he desires.

"This is the privilege of a carrier beyond his own line, and establishes his relation to such transaction as that of a private carrier for hire. The private carrier for hire is but a bailee for hire and as such is only liable for negligence; that is, for failing to exercise that degree of diligence which is required of him. If he is not negligent he is not liable, and, yet, it is well settled

that the bailee for hire may contract against such liability even to the extent of removing it entirely."

The vice of this argument is manifest in this; that when the carrier assumes the duties and obligations by a contract of extended carriage beyond his line, he thereby imposes upon himself by contract the very duty over such other line, which the law, from considerations of public policy, has imposed upon him over his own road. And, while by the general law he is not a common carrier over the connecting carrier's line, because he owes no duty of such carriage, and is not bound, by operation of law to carry over such other line; yet, if he voluntarily contracts such additional obligation of carriage his *employment* is also changed. His *identity* is then changed by the functions which he has assumed. He is performing by agreement the office of a carrier over another road. His employment is the same now, as that which he was before exercising over his own road; he is receiving the same compensation; he has secured all the rights and benefits and endowed himself, by contract of carriage with all the functions and characteristics of a common carrier; and the law then says, "You are now, by reason of the functions assumed, *common carrier*, and you can not perform the office of a public carrier and avoid the liabilities which such an occupation imposes; neither can you change your identity by a contract, or a mere declaration, that you are not a common carrier; nor, can you alter or change the obligations resting upon you as such common carrier by a contract that you will not be liable as such so long as you exercise the functions."

In other words, the character of the employment is not to be tested, determined or ascertained by the mere de-

clarations which the carrier may make regarding the limit which he undertakes to place upon his liability, either upon his own or any other road, but his character is determined by the functions he performs, or which he assumes to perform in relation to the public carriage of goods.

The nature of the business he undertakes determines whether or not he is a common carrier.

To briefly sum up the whole argument, the law fixes his relations as that of a common carrier over his own route, and while he may modify his common law duties and by contract limit his liability over his own route, still, he is none the less a *common carrier*, although he may expressly stipulate (as he has done in the first one of the fifteen release clauses in this contract) that his "liability shall be that of a private carrier for hire."

So, also, though he is not in general acceptation of the term, a common carrier beyond his line, and is not made so by law, and owes no duty to carry goods beyond the terminus of his route, yet, he is not prohibited from undertaking to carry the goods to a point beyond his own line and over the route of another carrier, and may contract to do so, and thus bind himself to deliver goods to their ultimate destination. But when he enters into such a contract and undertaking, and accepts compensation therefor, is he not exercising the same functions beyond his road which the law requires him to perform upon his own line? Is he not then, indeed, a common carrier beyond his line by reason of his own undertaking and the voluntary occupation he has thus assumed? Will, therefore, the mere declaration upon his part, that he is not a common carrier, or, that he will not assume the duties as such, operate to change his nature, or the nature of the

business upon which he has embarked? Most certainly not. The only reason ever assigned, or that could be assigned, for permitting the carrier to limit liability to his own road is because he is not bound by law to carry beyond his road, but the very minute he obligated himself to carry beyond his road *eo instanti* the law fixes his liability.

Lawson on Contracts states the rule as follows: "The law attaches his responsibility to his employment or calling, and if he assumes the calling he has no power over the duties which the law annexes to his calling. His assuming the character of a common carrier depends upon his own will or assent; but if he undertakes the occupation, the liabilities which come upon him in respect to goods brought or borne to him to be carried, are imposed by law, and not created by assent or agreement."

Therefore, when he undertakes by special agreement to carry goods beyond his line he is a common carrier beyond his line, and his liability in such cases has been frequently declared by the courts and announced by all the leading text writers.

The rule is thus stated by Lawson on Contracts at p. 350, Section 332.

"In this country it is held that a common carrier may limit his responsibility as an *insurer* by special contract but that he can not by any contract exempt himself from responsibility for the consequences of his own negligence or for the negligence of his servants or agents. Contracts of the latter character being void because they are against public policy and because they are supposed to be obtained under circumstances which gave to the carrier an undue advantage in obtaining terms which the law can not enforce without giving sanction to fraud or oppression."

So, also, Beach on Modern Law of Contracts, Vol. I, Sec. 611, states the law as follows:

"A common carrier has power to make a contract beyond the terminus of his route and thereby render himself liable for

the whole distance. When a carrier contracts to carry goods to a point beyond the terminus of his own line, and there deliver them, (such is the contract at bar), he is liable not only for his own negligence but, also, for the connecting carriers throughout the entire route. The connecting carriers are, in such cases, regarded as his agents, for whose acts he is held responsible."

Ray on Negligence of Imposed Duties. Freight Carriers, p. 394, Sec. 99, states the law as follows:

"Railroad companies, unless forbidden by their charters, have the power to contract for shipments the entire distance over any connecting lines. The contracting carrier is liable upon other lines as upon its own."

Lawson on Contracts of Carriers, Section 235, states the rule fully as follows.

"A common carrier has power to make a contract to carry to a place beyond the terminus of his route and to render himself liable as such for the whole distance. All connecting carriers in such case become his agents for whose negligences or other defaults he is responsible, and he has no more power to evade by contract the consequences of their negligence than he can the results of his own."

In the light, the law thus well settled, both by sound reason and authority, it would seem to be little less than folly in counsel to zealously contend for a doctrine at variance with both logic and sound reason and unsupported by authority outside of one or two jurisdictions in the United States, and which this court has expressly disapproved and refused to follow, or to recognize as just in practice, or sound in principle and opposed to public policy, and this court expressly held in R'y Co. vs. Lockwood, that it would not enforce that portion of the contract of the carrier which stipulated for exemptions from liability for negligence of his servants, although the contract was made in

New York with a New York corporation, where such contracts had been held valid.

And, in Michigan Cent. R. R. Co. vs. Myrick, 107 U. S., 102, this court decided that what constitutes a contract of carriage is not a question of local law upon which the decisions of the state courts must control, but that such contracts were matters of general law upon which the United States Supreme Court will exercise its own judgment.

It is, indeed, asking this court to make a feble surrender of a long established and just policy, to mere importunity, without sound precedent or authority, and to announce a doctrine at variance with justice, at war with reason and condemned by experience, and to turn these quasi public institutions loose, unfettered and unrestrained, to make any contract they please, whereby they may ply their avocations and contract to carry goods over other lines, and over the lines of other carriers, by land or sea to the remotest parts of the globe, and divest the shipper of any control, care or custody of his goods, or the right to make his own arrangements with connecting lines; to demand and receive compensation for through rates and charges for through carriage, and, in the very instrument by which they enlarge their scope of operation and sphere as a common carriers, divest themselves by contract from all liability which is so indissolubly attached to the very occupation they thus assume.

Such a rule of law would render it far more profitable for the carrier to carry over other lines than over his own. He could contract and receive compensation to carry anywhere, over lines of insufficient and irresponsible carriers, and employ negligent, careless, inadequate

and insolvent agents and other public or private carriers and end all liability when the goods had left its line of road. To open such inviting field of operation and undertaking to railroads and express companies, that have become recognized monopolies in the function of carrying goods and property, without at the same time holding them responsible, at least, for the *negligence* of those whom they employ and pay to complete their contracts of shipment, would we say, be but to surrender the rights of the shipper, which it has been the uniform policy of the law to uphold and protect, to the insatiate greed and avarice of the quasi public institutions that are forever insidiously encroaching upon well defined rights and prerogatives under the ancient rules of law.

It would be but to abandon the shipper to the wiles and artifices of shrewd and competent, if not subtle and crafty agents, willing and eager to over-reach him in the matter of securing terms for their employers, armed in every instance, as in the case at bar, with already drawn and printed contract, carefully prepared by the best legal talent which they are able to secure, every clause of which is drafted, so far as the law will permit, to secure immunity, or avoid responsibility upon the part of their principals.

The court will not fail to note that at the very outset of this contract among the *rules and regulations for the transportation of live stock*, that it is recited:

"No agent or receiver of this railway has any power or "authority to bind the receivers in regard to the shipment of "live stock, except by written contract in the following form."

That is, the form in which this contract is written.

It is apparent, therefore, that these shippers were compelled to execute this contract in the entirety or make no contract at all.

It is but just, therefore, that courts should scrutinize these contracts, which are ex parte in form and in fact, and declare void and inoperative, those parts which attempt to relieve the carrier from liability which public policy forbids they should escape.

Our duty would not be fully discharged toward our clients or the Supreme Court of Missouri if we omitted to give a short analysis of our understanding of the opinions of the court in the cases, Dimmitt vs. R. R. Co., 103 Mo., 59, and McCann & Smizer vs. Eddy, Mo., now under review, where the statute in question is interpreted and its office is separately declared and its function assigned in reference to each of those two cases. Especially does this seem to be necessary in view of the ingenious attempt upon the part of the adverse counsel, who by quoting from parts of the latter opinions, seeks to place the decision in conflict with the federal constitution. While we conceive the attempt to be wholly impotent and abortive in the light of the full text of the decision which is before this court, it still remains a duty incumbent upon us as counsel to elucidate, so far as we are able, the language of the Supreme Court of Missouri, and to lend to this court any aid in our power in enabling it to arrive to a clear and perfect understanding of what was decided in each of these opinions.

We need not dwell longer upon Dimmitt case than to call attention to the wide difference in the facts of the two cases. In the Dimmitt case there was no express undertaking on part of the carrier to carry the goods to

the point of ultimate destination, nor was there anything contained in the bill of lading there under consideration indicating either an intention to limit liability in its own road, or to limit its duty of carriage to its own road, but the carrier had simply issued a bill of lading to a point beyond its road—in the following form:

MARKS AND CONSIGNMENTS.	NO. PKGS.	ARTICLES.	WT.
J. W. McAleer, Deadwood, D.T. via. Ft. Pierrie. Acc't—Dowerty & Co.	1	Box Cigars. Stamped, corded, Sealed.	200

Now it was conceded by the Supreme Court of Missouri, that prior to the adoption of the statute, by reason of the Supreme Court of Missouri having adopted the American rule of construction, that this bill of lading, in the absence of other satisfactory evidence showing to the contrary, would be only an undertaking upon the part of the carrier, to transport the goods to the end of its line and there, by delivering to the connecting or forwarding carrier, end its liability; and, therefore, would, in that case, in the absence of the statute referred to, have held that such was the limit of their *undertaking* and therefore the limit of their liability; but, the Court there held that the purpose of the statute 944 referred to, was to adopt, in this sort of a case, the English rule of construction in Missouri as distinguished from the American rule, and that by the English rule of construction, thus adopted, such a bill of lading as this, would, in the absence of any limitation in the bill itself, or from other evidence showing to the contrary, be construed by the court to be a *through undertaking* by the carrier. In deciding this case the court used the following language:

"This *prima facie* case the statute makes for the plaintiff on the facts stated."

It is apparent that this is as far as the court needs to have gone in deciding this case, and that the balance of this paragraph is mere *dictum*, decided to be such by the court in the case at bar, and was only entitled to a place in the opinion to illustrate that the carrier under the statute had a right to make any valid contract it chose, relative to its duty or liability, and that the English rule did not place any limitation on the right of contract by the carrier, thereupon stated the substance of the English rule in the following language:

"In order to defeat it [this *prima facie* case made by the statute] the defendant must show that by specific agreement it only contracted to carry the property to the terminus of its own line, or, what is equivalent, that there was a specific agreement that it was to be liable only for loss or damage occurring on its own line."

This was a fair statement of the English rule, a correct declaration of the law and a proper limitation when applied to the *Dimmitt case*, for in that case, as already shown, there was no express contract or undertaking upon the part of the carrier to transport the goods beyond its line, whereupon the carrier might have very properly said in this bill of lading: "It is expressly understood that in receiving the package we will only carry the same to the end of our road and there deliver it to the connecting carrier to complete the shipment", or what would have been equivalent, in the Dimmitt case, as stated by the court, it might have made a specific agreement that it was to be liable only for loss or damage on its own line; for, by such language or agreement, in this bill, it would have negatived any

intention that it had attempted, or undertaken a through carriage of the goods; it would have thus overcome the presumption that it was a through carriage. It would have defeated the prima facie made by the statute that it was a through undertaking upon the part of the carrier, and the court would not, thereupon, have held it liable for anything beyond its road, because it would not have deemed it to have undertaken to transport the goods beyond its line.

But, in the Dimmitt case, there being no limitation upon its contract of carriage, and nothing to negative its intention to carry the goods to their destination; no agreement that it was only liable for loss or damage occurring on its own line, and having received the goods to be *transferred* and *delivered* to a point beyond its road, it was, by reason of the English rule of construction, which the statute had adopted, deemed to be a through contract upon the part of the receiving carrier, and, for that very reason, and that alone, it held the carrier bound for the negligence of his connecting carrier which it employed to complete its contract.

So, in the case at bar, the court holds the receiving carrier bound for the negligence of its connecting carrier, and agent, because, and only because, *it has undertaken a through contract of carriage*. Here the court finds, not *a mere receipt* or bill of lading naming a point of destination beyond the route, but an absolute agreement, in good set terms, by which it assumes the duty and asserts the right and privilege of carrying the goods, for an expressed consideration and through rate, from the point of shipment to its ultimate destination. A court need not here resort to any distinctively American or English rule of interpre-

tation to find the scope of this undertaking, for it is alike, definite and certain by the plain rules of contract. It is open, plain and undisguised in this respect.

Ah, but plaintiff in error says:

"In the Dimmitt case the court used this language: In order to defeat it (meaning the *prima facie* case made by the statute) the defendant must show that by specific agreement it only contracted to carry the property to the terminus of its line, or *what is equivalent*, that there was a specific agreement that it was to be liable only for loss or damage occuring on its own line."

Gathering inspiration from this utterance, the plaintiff in error evidently reasoned thus: "that since the Supreme Court of Missouri has decided that a contract or agreement limiting liability to the carrier's own road, *is equivalent to a contract* only to carry to the terminus of its road; therefore, an instrument can be drawn by which we may make any contract we please with the shipper, and by simply using somewhere in the agreement the magical phrase, that "*we are only to be liable for loss or damage occurring on our own road*," then the contract (no matter what other contradictory language, or inconsistent declarations it contains) will, *thereby*, be instantaneously transformed into a contract *only to carry to the end of our own line*, and the court, by reason of its language quoted in the Dimmitt case, has promised to so declare."

Here, then, they reasoned, is an open door through which we may enter into a widely extended and unlmited field of operation as a carrier beyond our own road, and at the same time avoid all liability on account of our undertaking. Here in Missouri, at least, they had found a royal road, an *open sesame*, by which they could circumvent the policy of the law and become carriers beyond their road, and could, therefore, contract with the shippers to transport him and his goods to any point within, or without, that state, and over the line or

lines of any number of intermediate common carriers by land or sea, and avoid all liabilities for its negligence and the negligence of the agents employed for this purpose. Such was evidently the inspiring hopes which led to the drafting of the present contract at bar.

But, did they correctly interpret the language of the court; and did not the court only mean to say, that a clause limiting liability to its own road, *was only equivalent to an express contract to carry to the end of its own road*, only in a case like the one then at bar, where the carrier *had not in express terms undertaken to carry to a point beyond its terminus*, as in the Dimmitt case? This question remains alone to be answered by the Supreme Court of Missouri in the decision of the case now before this court, the full text of the opinion being found at page 82.

We need not dwell upon the fact whether or not the statute is unconstitutional as construed in the Dimmitt case, for two reasons, first, that that case is not before this court, and, second, because it is not contended by the plaintiff in error that the statute, as there interpreted is in conflict with the constitution. And, yet, the same general interpretation of the purpose of the statute as declared in the Dimmitt case, is followed in the case at bar. Its meaning and function as there declared are not changed, nor its office enlarged, further than to render it applicable to the altered state of facts which this case at bar presents.

Let us consider in detail the opinion of the Supreme Court of Missouri in the present case, and especially the mission it assigns to the statute to ascertain if the complaint has any just foundation in fact, or whether the statute, as there construed

and applied to the fact before the court, constitutes any limitation upon the right of the carrier to make any lawful, valid and binding contract it chooses to enter into between itself and the shipper; or, whether it interferes in any way, or places any restrictions upon the power or right which the constitution alone vests in Congress to regulate commerce among the states.

In arriving at the determination of this question, this court will follow the interpretation of the statute which the Supreme Court of Missouri has placed upon it, since that court, alone, has the right to construe the meaning of the statutes of its own state.

This court will not adopt a construction of its own, nor a construction contended for by counsel for plaintiff in error, at variance with the construction placed upon it by the Supreme Court of Missouri; even though this court should believe that the construction adopted by that court is at variance with the legislative intent.

Therefore, with the language of the statute itself, or the meaning of the language, or with the legislative intent, this court will exercise absolutely no concern, further than to ascertain the intent and the meaning of the statute as ascertained and declared by the Supreme Court of the State of Missouri; and, unless the statute as construed and interpreted by that court should clearly violate some constitutional prerogative reserved alone to Congress, this court will not interfere, with the judgment rendered by that court.

The statute is as follows:

"Sec. 944. *Liabilities of Common Carriers.*—Whenever any property is received by a common carrier to be transferred from

one place to another, within or without this State, or when a railroad or other transportation company issues receipts or bills of lading in this State, the common carrier, railroad or transportation company issuing such bill of lading shall be liable for any loss, damage or injury to such property, caused by its negligence or the negligence of any other common carrier, railroad or transportation company to which such property may be delivered, or over whose line such property may pass; and the common carrier, railroad or transportation company issuing any such receipt or bill of lading shall be entitled to recover, in a proper action, the amount of any loss, damage or injury it may be required to pay to the owner of such property, from the common carrier, railroad or transportation company, through whose negligence the loss, damage or injury may be sustained."

The court, in its opinion, on page 84 of the transcript of the record, then proceeds as follows:

"This section was construed by the court in the Dimmitt case "(103 Mo. 440) and its application to the contract there in "question was determined. In that case it was held that the "intent of the statute and the evident purpose was, to apply to "common carriers the English rule of duty and liability in re- "spect to the carriage of property beyond their own route, as "distinguished from the American rule which was at the time "recognized as the law of this state."

In that case (Dimmitt case) the goods were assigned to a point beyond the route of the receiving carrier, and there was no express limitation by the contract not to carry to their destination.

"This ruling was in accord with the decision of the English "courts, but under the law as it existed prior to the statute, "upon the facts shown to have existed, the receiving company "would not have been liable for the loss."

Because the bill of lading alone upon its face, under the American rule, would not have been evidence of a contract to carry beyond the receiving carrier's own line, and would not have made even a *prima facie* case. But the court continues:

"There is no doubt the statute, by its very terms, has the "effect of applying the English rule so far as it makes the re- "ceiving carrier responsible for the defaults of other carriers "through whose *agency it undertakes to complete the contract of "carriage*. This is as far as the decision in the Dimmitt case "goes.

"But, the statute can only be held to adopt so much of the "English rule as is consistent with it. It cannot properly be held "to abrogate the existing law of the state unless inconsistent with "it. The statute engrafted upon the law of the state, as it then "existed, makes the rule by which we must be governed. The "English law does not make it.

"To the extent then that the statute declares the English "rule, the decision of the English courts would be authority for "it's (the statute's) interpretation, but they would not be author- "ity where the statute and the English rule conflict. The stat- "ute must be interpreted in the light of our own law, and, as "far as possible, in conformity with it."

After quoting from a part of the decision in the Dimmitt case the court says:

"The law as stated (in the Dummitt case) is within the "terms of the statute *and is inconsistent with the law of this state*, "as, previously declared by this court. (Citing Coates "vs. Express Company, 45 Mo.,238,Snyder vs. Express Com- "pany, 63 Mo., 376."

In both of these cases, and many others, the Supreme Court of Missouri has clearly held that where the carrier's contract of carriage bound it to carry the goods beyond its own line, it thereupon became liable for the *negligence of the agents it employed to complete* its contract of carriage. The court proceeding in its opinion says:

"The provision of the statute is that 'whenever property is "received by a common carrier to be transferred from one place "to another.' This language does not restrict, but rather recog- "nizes the right of the carrier to limit its contract of carriage to "the end of its own route, and there deliver the property to the

"connecting carrier. There can be no doubt then, that under "the statute, as well as under the English law, the carrier can "by contract, limit his duty and obligation to carriage over its "own route."

Now we wish to pause here, to comment for a moment upon this language of the court. The court in saying that "This language of the statute does not restrict but rather recognizes the right of the carrier to limit its contract of carriage to the end of its route and there deliver it to the connecting carrier," does not mean to imply thereby, that the *statute forbids*, or in any way restricts its making a contract also of carriage beyond its road. This right has always been recognized by the courts of Missouri both before and since the enactment of the statute. The only question in the mind of the court is the effect of such contracts when so made, and especially the construction that should be placed upon them by reason of the rule of construction adopted by the statute in question. Therefore, in order to differentiate between the decisions of the English courts, which permit the carrier to end all question of liability beyond his road by a contract limiting liability to loss or damage occurring on his own road; and the rule of liability as declared by the statute under discussion, the court says:

"But it seems that under the decision of the English courts, "the carrier can also limit his liabilities to loss or damage "occurring on his own route, by specific agreement that it "should only be so liable.

"In the Dimmitt case the English rule was stated to its "full extent, *though unnecessary to the decision in that case;* "there having been no attempt to make such a limitation.

"While, under the decisions of this court, it has "been held that a carrier could by contract limit his common

"law liability as an insurer, it was before the statute, and has "since been uniformly held that he could not by contract, or "otherwise, relieve himself from liability for loss or damage oc- "casioned *by his own negligence or that of his agents or employes.*

"Such was the law when the statute was enacted. "There is nothing in the statute that indicates an intention "to change it. Indeed, it seems to be recognized by the statute, "for the statute by its terms only declares a liability for loss or "damages occasioned by *negligence.*"

Wherefore, the court says:

"The *dictum* of the court to the effect that an agreement "that a carrier should only be liable for loss or damage occur- "ring on its own line, *is equivalent to an express contract to carry "the property only to the terminus of its own line*, can not be "taken as the law of *this case where there is an express contract* "for a *through carriage, and also an agreement for non-liability.*"

Such was not the meaning of the court and its language was not applicable except in a case like the Dimmitt case where there was no express contract entered into.

The court continues:

"Where the original undertaking is in doubt *such an agree- "ment might be evidence* of the intention of the parties in respect "thereto. This question is not involved here and need not be "decided.

"We cannot, therefore, give such an interpretation to the "statute as would permit the carrier to contract for a through "shipment and at the same time exempt himself from liability "on account of the negligence of connecting carriers. Such an "interpretation would in effect operate as an appeal of the vital "provisions of the law which declares conclusive liability in such "cases.

"The statute does not undertake to change the law in "respect to liability of a carrier for his own negligence, but to "extend it to connecting carriers as well, and declare a liability "for negligence without regard to which is in fault."

Let us suppose that Section 944 in the place of being ex-

pressed in the language of that section, was expressed in the following language:

"Whenever property is received by a common carrier in this state without any conditions, contract or limitations whatever; to be transferred from one place to another, whether such place to which it is to be transferred be within or without this state, the carrier so accepting such goods, shall be deemed to have undertaken to become a carrier of the goods so received to the place to which it has received them to be transferred—or whenever any common carrier issues a naked receipt or bill of lading in this State to a certain point named in said bill of lading or receipt, without any limitations of liability or without limitation upon its obligation of carriage, such initial carrier shall be presumed to have undertaken to transport the goods to such point named therein; and in case any common carrier within this State binds himself by contract to carry goods over the lines of other carriers, railroads or transportation companies, it shall be liable, not only for its own negligence, but also for the negligence of other carriers whose agencies it employes to complete its contract of shipment."

Could the statute in this language be said to be unconstitutional for the reason suggested in the assignment of errors? Could it be that such statute would be in conflict with the Federal Constitution or to impose any restriction or limitations upon interstate commerce? The carrier is thereby left free to make any contract he may choose, which is not void as being against public policy. It only prohibits him from contracting against his own negligence or the negligence of his agents. He is neither prohibited from nor required to carry, or contract to carry, goods beyond his own line. He may end all question of his liability beyond his own line by limiting his contract of carriage to his own line, but if he extends his contract of carriage beyond his own line, he can not limit his liability for negligence in such

case to his own line, for the law holds him to responsibility for the negligence of his agents as well as his own negligence. A statute imposing such duty upon a common carrier could not be a restriction, or limitation upon the power of Congress to regulate interstate commerce; it is only declaring a rule of liability arising from certain contracts, which the carrier may, or may not, enter into, it only imposes upon the carrier the same liability for the negligence of the agents it employs in transporting beyond its road, which the law from considerations of public policy imposes upon all common carriers in transportation of property over their own lines, though they may extend into other states."

This court will observe that the Supreme Court of the State of Missouri has placed a construction upon Section 944 in question, as if it were expressed in the identical language in which we have supposed it to be written. In constructing the statute it has adopted an interpretation of the legislative intent in harmony, and not in conflict with the Federal Constitution. Such is a well known rule of construction of statutes. This court will adopt no other interpretation of the statute than that construction which the Supreme Court of Missouri has placed upon it, and when this court is satisfied, as it seems to us it must be, in this case, that there is absolutely no conflict, in fact, between the statute as it is thus construed and the Federal Constitution, the judgment of the Supreme Court of Missouri will be unanimously and cheerfully affirmed.

Perhaps we will be pardoned for farther trespass upon the time of the court to call attention to the error that was committed by the court in its first opinion rendered by Judge Sher-

wood, which led to a rehearing and reversal of the case by the court in *banc*.

Strange to say, the court in that opinion so misconstrued that clause in the contract "releasing the company from all liability after the stock left its road," as to extend it to a release from its through contract of carriage which it had already entered into, when, as a matter of fact, upon a closer examination the court discovered that the clause did not purport to release the carrier from its contract to carry the stock to its destination, but only from the liability which should come to it for such carriage beyond its road.

This came about by the judge who wrote the opinion following the dictum of the court in the Dimmitt case, that seemed to declare that a contract limiting liability to the carrier's own road would be construed as only an undertaking to carry to the end of its road.

Therefore, the court in the first opinion construed this contract to be only a contract to *carry* to the end of the line of the plaintiff in error, and not as a through contract. This was an error so manifestly opposed to the plain terms of the contract, that the court, when its attention was directed thereto, could not permit to stand.

But the Honorable Judge who wrote this opinion, having fallen into this error, and decided that the M., K. & T. Railway Company had only contracted to carry the goods to the end of its line, thereupon based his subsequent opinion upon this erroneous conclusion, thus, the language of that opinion is only applicable to a case where the contracting carrier has not bound itself to carry further than the end of its route.

There is nothing said in that opinion that could not be endorsed by this court or the Supreme Court of Missouri as the law applicable to this case, *if* the learned Judge was right in his construction of the extent of the duty of carriage undertaken in the contract.

That he was wrong in such construction of the extent of the obligation seems to us to be beyond controversy, and in this we are supported by all the rest of the six members of the Supreme Bench of Missouri. In the light of this explanation we approve the utterance of Judge Sherwood in the first opinion of this case as fully as does counsel for plaintiff in error. But there can be little significance attached to it in this case, for the very reason that the law as there announced, applies to the different state of facts, if, as we contend, this is a through contract of shipment.

Certainly, therefore, if the contracting carrier had not undertaken a through contract, then the learned Judge was right in saying:

"*If* the statute under discussion is to be construed *literally; if* it is to be *interpreted* as casting on one railroad company the burden of *negligence* of another railroad company, *against whose negligence the company sued has explicitly contracted, as in the present case, then* I have no hesitancy in saying; I do not believe that the legislature has the power thus to interfere with the right of a railway company to contract, speaking in a general way, as it may deem fit." * * * *

Moreover, *if* Section 944, *supra*, is to be construed as being operative beyond the boundaries of this State, then it is plainly a regulation of interstate commerce, and, therefore, under the prohibitions of the Federal Constitution."

It is evident, we say, that the learned Judge was only declaring that the statute *would* be unconstitutional if it was to be

construed literally, that is, if the statute should be so construed as to fasten an obligation upon the receiving carrier to answer for the negligence of all the carriers that came after him in a shipment where he had not only, not undertaken to carry beyond his own road, but had expressly contracted against the negligence of those who should undertake, for the shipper, the further carriage of the goods beyond the line of the initial carrier.

Certainly, if the statute should receive such a construction as this, it would have been *arbitrary*, tyranical and unjust, as well as unconstitutional, and would not have been upheld by any member of the Supreme Court of Missouri. But, that no such function has been assigned to the statute, is *too* plain to admit of any argument, in the face of the following language of the Supreme Court in *banc* in deciding this case:

"The statute *merely* prohibits a carrier, *who, by contract,* "*undertakes to transport* property to a point *beyond* its route "from relieving itself of responsibility for *neglect* to properly "perform its duty. It *only* imposes the duty and liability which "the law, from consideration of public policy, imposes upon all "common carriers in the transportation over its own line, al- "though they may extend into other states."

Judge Sherwood, who wrote the first opinion, did not mean to say that the statute would have been regarded by him as unconstitutional under such a construction as this, but would have expressly held that it was not unconstitutional if assigned no greater function than to make it liable for its own negligence or that of its agents, since the judge said in that very opinion:

"Of course, as against its own negligence, a corporation "would not be allowed to contract: this would be subversive of "public policy, and, besides, would be an abdication of the "duties and functions as common carrier which, by the very

"terms of its charter, it would not be allowed to abdicate or ab-
"rogate."

Therefore, if the judge had construed this contract as a through undertaking he would have either commended the office assigned to the statute, or would have held without regard to the statute that such a contract was void as against public policy.

And so, also, undoubtedly, the entire Supreme Court of Missouri would have held that the contract at bar was void as against public policy, even in the absence of the statute declaring such liability. Indeed the Supreme Court of Missouri had, before the enactment of the statute, in the case of Holliday vs R'y, 74, Mo., 162 (a case that arose in 1875, while this statute was not enacted until 1879) expressly held under a similar contract to the one at bar, that where the contract of shipment was for the entire distance the carrier "could not stipulate for exemptions from all liability beyond the terminus of his line." There is therefore, no foundation for the statement of counsel for plaintiff in error on page 26 of his argument:

"That there is no difficulty, therefore, in reaching the conclusion that but for the statute in question, the courts of Missouri would have held that it was competent for the plaintiff in error to have limited the liability in the manner attempted in the contract in question."

Such is not true in fact, as already seen by the former holding of that court. The statute simply declared a rule of liability, just and reasonable in itself; one in conformity with the general law of liability of carriers, in such instances, which had been adopted by the Federal, and nearly all the State courts, and especially by the Supreme Court of Missouri; it simply an-

nounced a rule that was against the public policy of the law to permit the carrier to violate.

We submit, therefore, that the statute as construed is in no way violative of any constitutional right, state or national, and that the judgment of the Supreme Court of Missouri should be affirmed.

Respectfully submitted,

J. H. RODES,

Attorney for Defendant in Error.

No. 11.

Brief (reply) of Rodes for D. C.

Office Supreme Court U. S.
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JAMES H. McKENNEY,
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IN THE

Supreme Court of the United States,

OCTOBER TERM, 1898.

NO. 11.

MISSOURI, KANSAS & TEXAS RAILWAY COMPANY, . . . Plaintiff in Error.

vs.

WILLIAM C. McCANN and MILTON D. SNIZER, Partners under the name McCANN & SNIZER.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

REPLY OF DEFENDANT IN ERROR TO ADDITIONAL ARGUMENT OF PLAINTIFF IN ERROR.

By J. H. RODES,
For Defendant in Error.

Sedalia Ptg. Co.

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The additional argument for plaintiff in error filed in this cause is confessedly subtle and ingenious, but when weighed, analyzed and tested by the final analysis it must undergo, before being sanctioned and approved by this Court, we believe its specious-

ness will be discovered and its falacy detected. It can not ultimately avail counsel either intentionally or through over zeal to misconstrue or misrepresent the holding of the Supreme Court of Missouri; yet, that such misrepresentation is the result of the effort of counsel for plaintiff in error, we believe we can conclusively show in the following reply to, "Additional Argument for Plaintiff in Error." Observe—

First. It best suits the purpose of counsel for plaintiff in error to dissect out from the body of the opinion of the Supreme Court of Missouri, in this case, isolated paragraphs, which, being separately and alone considered apart from the body of the opinion, seem to give colorable grounds for the conclusion which is sought to be drawn, but when read and analyzed in connection with the full text of the opinion, and in the reflected light of the former adjudications of that court, no such inference is warrantable, as we shall presently show.

Will this Honorable Court take note at the outset *that before the enactment of the statute of Missouri* complained of, and therefore without reference to it, and independent of it, in the case of Halliday vs. Railway Company, 74 Missouri, 162, the Supreme Court of Missouri held that: "*When a carrier undertakes to transport to a point beyond the terminus, beyond its own line, or to a point not on its own line*, it will be responsible according to the terms of its contract of shipment, *if it* contained no *prohibited exemption, for loss or injury occurring upon the connecting lines, as well as its own line?*"

In the face of this positive utterance of the Supreme Court of Missouri, directly to the contrary, and admittedly, before the statute was enacted, does it not seem as unwise, as it is unfair

and misleading, for counsel for plaintiff in error to assert and persistently contend before this court "that, *but for the statute complained of, and but for the power derived therefrom, there would have been no liability in the case at bar.*"

In the case above cited, which was exactly like the one at bar, where the initial carrier had contracted to *carry to the destination* which was beyond its line, the court expressly said, at page 160 of above cited opinion: "*As the contract of the plaintiffs with the receiver was for the entire route* (so in case at bar), *he, the receiver* (as in this case), *could not stipulate for exemption from all liabilities beyond the terminus of his line.*" So, whatever shall be the opinion of this Court, it must not be based on the assumption that the liability in this case is created by the Statute, and it must recognize the fact that if the Statute were extirpated, liability would have existed under this contract, and would have been declared by the Supreme Court of Missouri, and that too, independent of the Statute.

The plain truth is: that the Statute, in the place of being interpreted as extending and enlarging, much less creating a non-preexisting liability, of the carrier is, as interpreted and construed by the Missouri Supreme Court, made to recognize the right of the carrier to *restrict and limit the liability as an insurer for the entire route over which they contracted to carry*, but not to release itself from the *negligence* of its agents and only to forbid the carrier by contract or otherwise, to relieve himself from loss or damage, occasioned by his *own negligence*, or that of his agents or employees. (See language opinion on page 85 Abstract.) Continuing,—

The Court says: "Such was the law (mark the expression,

"*the law*") when the Statute was enacted. There is nothing in the Statute that indicates an intention to change it (*the law*), indeed it (the law) seems to be recognized (by the Statute), for the Statute by its terms only declares a liability for loss or damage by *negligence*."

"We cannot, therefore, give such an interpretation to the Statute as would permit a carrier *to contract for a through shipment and, at the same time, exempt himself from the liability on account of negligence of connecting carriers.*" Note that the Court says: That the initial carrier cannot exempt itself on account of the negligence of connecting carriers, *only in a case where it has made a contract for through shipment.* And why? Because plainly, the Court holds as it had held before, such connecting carriers, in such instances are the agents of the Receiving Carrier, employed and paid by the original contracting carrier, to complete for it, the initial carrier, its contract for through carriage. The Court holds that to permit them to contract, in instances where they had undertaken through carriage, for immunity from liability beyond its road, would be, to permit the carrier to relieve itself from the consequences of the negligence of its agents; for, in such case, the receiving carrier, by its contract, undertakes and voluntarily binds itself *to transport and deliver* to place of ultimate destination.

The Court concludes this paragraph of the opinion thus: "Such an interpretation (of the Statutes as that contended for by counsel for the Company, *i. e.*, that it may contract for a through shipment and undertake itself to ship and deliver goods to a point beyond its line and employ and pay one or many connecting carriers to complete its undertaking, and at the

same time exempt itself from liability on account of the negligence of connecting carrier), would, in effect, operate as an appeal of the vital provisions of "*the law*" (not the Statute, as counsel contends), which declares conclusive liability in such case." Let us ask the court to look at the meaning of the phrase, "*the law*," as here used. We contend that it means the law of this Court as previously declared, in the many cases cited. The Court had early said in this opinion (bottom page 84, Abstract), "The Statute must be interpreted in the light of '*our own law*,' and so far as possible, *in conformity to it.*"

The Court had previously said in the opinion (113 Orig. paging abs) that: "The law as stated (in the Dimmitt case) is also *within the terms of the Statute* and is inconsistent with '*the law*' (mark the expression here, 'the law') of this state as *previously declared by this Court*," citing Coats vs. Express Co., 45 Missouri, 238: Snyder vs. Express Co., 63—376. In each of these cases the Court held, that if the carrier contracted to carry beyond its road, it was liable for the *negligence* of the agents it employed to complete its undertaking: hence, the Court says, for it (the Court) now to adopt, as it is asked to do, such a construction of the Statute as would *permit the carrier to contract for through carriage and at the same time relieve itself from the negligence of the agents it employed to complete its undertaking*, would be to adopt a construction that would operate as a repeal of the vital provisions of "*the law*" (of Missouri) which declares *conclusive liability in such case.* For to do so, the Court would not be adopting a construction of the Statute in conformity with our own law.

The Supreme Court had early said, through Judge Wagner in Levering vs. M. T. Ins. Co. 42 Missouri, 88. "The law attaches the responsibility to his (the carrier's) calling and if he assumes the calling, he has no power over the duties which the law annexes to that calling. If he undertakes the occupation, the liabilities which come upon him are imposed by law." Hence, the Court held here: that when the Receiver of the M., K. & T. undertook to carry those cattle to Chicago, not merely to the end of its line, and deliver to the connecting carrier, it had then undertaken the duties of *a carrier and not a forwarder*, and could not release itself from the liability for the negligence of its agent, the Wabash.

The Court continues: "The Statute does not undertake to change the law in respect to the liability of a carrier for its own negligence but to extend it to connecting carriers as well (where it employs them as agencies in completing contracts undertaken) and to declare a liability for negligence without regard to which is in fault."

If there be any doubt between counsel as to what the Court meant, would it not be fair to let the Court itself explain the concluding language (at 115 Orig. paging abstract), where it says: "The Statute merely prohibits a carrier, who by contracts undertakes to transport property beyond its own line, from relieving itself from responsibility for *neglect* to properly perform that duty."

It only imposes the duty and liability which "the law" (mark the expression "the law") from considerations of public policy imposes upon all common carriers in the transportation of property over their own lines, though they may extend into other states."

When it comes to a last analysis, the Supreme Court of the State of Missouri holds, that the Statute of Missouri simply held that the effect of the Statute, was only to prevent the carrier by contract to relieve itself from its common law liability, as it had been declared to exist in Missouri. However, ingenious the attempt of counsel to make it otherwise appear, there is no doubt of this as disclosed by the concluding words of the Court, where it cites, Hart vs. R'y Co., 69, Iowa, 490, as authority for its holding. The Statute is simply a rivet, as it were, to the law as formerly declared. In effect, the Statute says to the Court: "You shall not permit these carriers to change, by contract, their common law liability as heretofore declared to exist by this Court."

The Statute is a mandate to the Court saying: "If the carrier wants to reap the benefit of a contract to carry the goods to its destination beyond its line, you must not relax the rule of law already established by this Court, which holds the principal liable for the negligent acts of its agents. If the carrier wished to reap the benefits of a through carriage, it must bear responsibility for the negligence at least of the agents it employs to complete its undertaking. It does not undertake to prevent, and does not prevent the carrier from issuing a through bill of lading providing it states in such bill of lading that it undertakes to carry the goods only to the end of its own line, and there deliver to the next carrier to complete the shipment. In the Dimmitt case there was a *through bill of lading* but there was no express contract for through carriage, as in the case at bar, that the receiving carrier would *itself transport and deliver at ultimate destination*. Therefore, the Court in deciding the present case, says

that if the carrier had in the Dimmitt bill of lading declared that, "it was to be liable only for loss or damage occurring on its own line," it might have been evidence of the intention of the parties only to carry to the end of their road. But the Court says, that that question is not involved in this case and need not be decided, because the receiver has in express terms, agreed and undertaken to carry the goods to destination.

Let us now examine this case in the light of the opinion of this Court in the recently decided case of Richmond & Allegheny R. R. Co., vs. Patterson Tobacco Co., 169 U. S., 311. from which counsel in his additional argument filed herein, affects to draw consolation, and by legal craft, rather to be admired than condemned, seeks to convert into a suggestion of authority for his contention. There is nothing in that opinion that warrants such claim or presages such a conclusion. The opinion of the Court, in this case, while it is clear and discriminating, seems purposely to avoid any intimation to prejudge the case at bar, which having been argued, must have been in the mind of the court. This can forebode no evil results to defendant in error and is only evidence of refined discrimination and an evident purpose of the Court to decide *only such questions as that case presented* and to leave the Court free to hear and determine the case at bar on its own merits. Counsel for plaintiff in error contends that the Statutes in Virginia is widely different from the Missouri Statutes. In language, —yes. In judicial constructions with which alone the Court will deal, there is a most marked similarity. Both the Virginia and Missouri Courts recognize the dominant power of the Federal Constitution, vesting in Congress alone the right to

regulate commerce among the states, and manifest a jealous intention to guard with profound respect the prerogatives conferred. Such has been the uniform purpose of the Supreme Court of Missouri, where it has repeatedly held Missouri Statutes unconstitutional, where there was any real or apparent conflict with the rights guaranteed carriers under the Federal Constitution (see Stanley vs. R R., 100 Mo., 435; Grimes vs. Edd., etc.; 126 Mo., 168, and many other cases). On this very account, the reasoning of the Missouri Supreme Court and the conclusions reached is entitled to much consideration and careful analysis, before being branded with such insubordination. Although feeble, perhaps, has been the defense of that Honorable Court against this arraignment and vigorous and ingenuous its prosecution, still, we confidently believe that this Honorable Court will not misunderstand or misinterpret the meaning and language of the Supreme Court of Missouri; and to, this end, may we urge the Court to carefully analyze for itself all the Missouri Court has said in the case in addition to the Dimmett case, 103 Mo., 433; Coates vs. Ex. Company, 45, 238; Snyder vs. Ex. Company, 63, 376; Sewing Machine Co. vs. R. R., 70, 672, and particularly, Halliday vs. R. R. Co., 74 Mo., 162, where the right to limit liability to its own road in through contracts, was discussed and determined against the carrier before the Statute was enacted, together with what faint light counsel for defendant in error has been able to reflect in his several briefs and arguments filed herein, and determine for itself if any prerogative of Congress has been brushed aside or infringed upon in even any remote sense. The Court will observe that counsel for plaintiff concedes at the bottom of page 9 of his additional

argument that "the decision in the Virginia case (which was approved by the Court) puts the subject in much the same situation in which it was left by the decision of the Supreme Court of Missouri, in the Dimmett case, 103 Mo., 433." Indeed, later on in same paragraph, counsel says: "As there interpreted, the Statute did not, in any manner, restrict the right of the carrier to limit liability to its own line." Certainly not, neither does the case at bar, unless the carrier by voluntary contract enlarges his obligation and duty of carriage by specifically entering into a definite undertaking upon its part by which it agrees to become a carrier beyond its own line, or to become a carrier over all intervening lines between point of shipment and ultimate destination.

The Court did not need to invoke, *and did not invoke the aid of the statute* to determine what the undertaking of the carrier was in this case, because it was not in doubt. The Court did not mean to intimate in the Dimmett case that the carrier could agree and undertake a through shipment and also avoid the liability for the negligent acts of its agents on the other lines it employed to complete its undertaking. On the other hand, the Court said at the outset in the Dimmett case: "At the time of its enactment (meaning the Statute) 'the law' *was well settled as now*, that a common carrier may contract to carry to a place beyond its route, *and thereby render himself liable as such for the whole distance*." i. e.—If it undertook a through carriage by special contract, it must answer for the negligence of the agent it employed in completing its agreement. It did not mean, as already shown, that it could reap the rewards of its through agreement without being responsible for the

negligent acts of the agent it employed to do the work it had undertaken to perform. In the Dimmett case, mark you, there was no evidence of a through contract except from the fact that the goods were billed to a point beyond its road. The carrier, although it had issued a bill of lading, did not in express terms undertake to carry and deliver to point of destination. And the Court held that by reason of its so issuing its through bill of lading and placing no limit upon the extent of its duty of carriage, it was presumed just as in the Virginia case, having accepted for transportation the goods directed to a point of destination beyond its own line, to assume thereby an obligation for its safe carriage to its point of destination. But in Missouri, when it is ascertained as a fact by satisfactory evidence that the carrier has undertaken to carry to destination, whether by aids of the Statutes or from the express terms of its agreement, it cannot limit liability to its road; in other words, it cannot avoid liability for the negligence of its agents. Mark you, in the Virginia case, the carrier expressly stipulated that "it should only be liable for the *transportation* of the goods over its own line, and beyond this to be responsible *solely as a forwarder*, that is to say that all its obligations should be considered discharged, if it safely *carried the goods over its own line and delivered them to the connecting carrier.*"

If the carrier had seen fit to place such a limitation upon his undertaking in the *Dimmett* case or in the case at bar, although it might have issued its through bill of lading as in the Virginia case, there would be no pretense under the law, as declared by the Supreme Court of Missouri, that there was any liability beyond its own line of road, because it would not have

been deemed to have undertaken to carry beyond its road, and its liability would have ended with its duty to carry But in the case at bar the carrier is not willing to end its contract and duty of carriage with the end of its road, but seeks to extend, and by contract in express terms, does extend that duty and obligation of carriage *over the entire distance*, and does employ and pay the intervening carriers to act as its agent in the completion of the contract, but seeks to *avoid responsibility for the negligent acts of the agent it employs*.

The Court holds the carrier is not only prohibited from doing this by the Statute referred to, but that "the law," irrespective of the Statute, from considerations of public policy, likewise prevent the carrier from such exemption from liability, and the Court had so directly declared, as already seen, in Halliday vs. Railway Company, cited supra.

It is not denied that the Court holds that the Statute has the effect of preventing the carrier by contract, from limiting liability to his own road where it undertakes to become a carrier beyond its road. But this is the very head and front of its offending. No more, no less. And, if this is treason against the rights and prerogatives reserved to Congress and an unwarranted interference with the rights of the carrier, under the Inter-State Commerce Act, then, of course, it is within the province of the Court to deal with the Statute as it shall see fit. But, if the Court should hold that the Statute as construed is unconstitutional, for the reason assigned, then it would seem the Court must remand the case to the Supreme Court of Missouri to determine whether or not liability exists under the laws of the State of Missouri upon the contract independent of the aid of the Statute.

But, for the time, conceding that the Court arrives at its conclusion alone by aid of the Statute, and fixes liability against defendant for the negligence of its agent, the Wabash Railroad, and that too alone, on account of a liability which the Statute creates and imposes, and holds, that but for the Statute, no liability existed under the laws of the State of Missouri, or could exist, how would the cause then stand? And, could the Statute be justified under the arraignment of being unconstitutional? Certainly it could not be condemned under the holding and interpretation given it in the Dimmett case. This, defendant in error, expressly concedes, and this interpretation is approved by this Court in R. & A. R. R. Co., cited supra.

And the Statute, as there construed, is declared to be "no attempt to regulate and control contracts as to Inter-State shipments, but simply to establish a rule of evidence ordaining the character of proof."

We say that, thus far, the Statute is justified and approved by this Court, and needs no further comment. If, in the case at bar, there is any enlargement of its scope, it is only to the extent of holding that the Statute also prohibits a carrier in Missouri from contracting for a through shipment and binding itself to carry over other lines and avoiding liability for the negligent acts of the agents it (the contracting carrier) employs in completing its undertaking. We frankly say that if such is the holding of the Court, which for argument only we concede; and, if to establish such a rule of law, is an unwarranted regulation of Inter-State Commerce, then, and only then, must the Statute fall. This, it must be conceded, is a Missouri contract, there made and entered into, and there in part performed. The laws of Missouri

do not require the receiving carrier to undertake a shipment over other roads, or to a point beyond its own line; neither does it prevent the carrier from entering into such undertaking; therefore, if the carrier agrees to become a carrier over other roads and binds itself by voluntary agreement to assume a duty and obligation that the law does not impose, it evidently does so for its own advantage. And by doing so, thereby divests the shipper of any right to make its own arrangements with any intermediate carrier, and thereafter absolutely controls the destiny of the shipper and his goods, and he has, thenceforth, no further right and dominion over them. So far as it is thereafter in the power of the shipper to prevent, the contracting carrier might deliver the goods to incompetent and irresponsible agencies to complete a carriage for the shipper which it, the receiving carrier, had itself agreed to perform. Can it therefore be said to be unlawful or unjust to the carrier who makes such a contract for the Legislature to fix, in advance, the liability which will flow from the making of such an agreement? And, to say to the carrier: "That if you make such an agreement, and assume such an undertaking you shall, as such carrier, be bound to answer to the shipper for any loss or damage sustained by him on account of the negligence of the agencies you employ to complete the agreement you have made?"

Certainly after careful consideration and minute analysis of the subject, with a jealous intention to respect and guard the bounds set upon the State's authority, the Supreme Court of Missouri did not conclude, that such Statute was in any way in conflict with the commercial power of Congress prescribed by the Constitution, as the following language of the

Court clearly indicates. "We are unable to see, as contended by the defendant, that the construction we give to this Statute makes it repugnant to the provision of the Constitution of this United States, which gives to Congress, alone, the power to regulate commerce among the States.

"The Act in no way operates as a regulation of trade and business among the States. No burden or restriction on transportation is imposed. Carriers are left free to make their own contracts in regard to compensation between the States subject to Congressional regulations.

"The Statute prohibits the carrier who by contract undertakes to transport property to a point beyond its own route from *relieving itself of responsibility for neglect to properly perform that duty. It only imposes the duty and liability which the law*, from consideration of public policy, imposes upon all common carriers in the transportation of property over their own lines, though they may go into other States."

In reference to that portion of the Statute now under consideration, let us suppose that Statute had read as follows: "In every case where a common carrier voluntarily enters into a contract within this State by which it agrees and binds itself to carry goods or property of the shipper to a point of ultimate destination beyond its line of road and over the lines of other roads and transportation companies, either within or without this State, and in pursuance to the terms of such agreement and undertaking employs and pays other common carriers and intermediate transportation companies, whether within or without this State, to complete for its undertaking and agreement, and shall, in such agreement provide a clause exempting, or purport-

ing to exempt it from all liability or loss or damage occasioned by the negligence of said common carriers, or intermediate transportation companies thus employed and paid by it in the completion of its said undertaking, then, and in each such case such clause in its contract exempting it from liability for the negligence of such intermediate common carrier or transportation company, employed by it as its agent in the completion of its undertaking, *shall be null and void and of no effect as an attempt to release itself against liability of the negligence of its own agents.*" Such clearly is the additional interpretation given to the Statute in excess of what it was declared to mean in the Demmett case.

Would not such Statute be clearly within the police power of the State to regulate the management and operation of railroads and prevent them from releasing themselves from the negligence of their agents and be designed to protect property otherwise endangered by a relaxation of the rule of their common law liability? It says to these carriers, you may engage in the employment and embark in the business of carrying goods over other lines and into other States, or, even between continents if you choose, and you agree to transport by land or sea; you may employ and pay intermediate agencies and other carriers and transportation companies to complete, for you, your undertaking, but any contract you make divesting yourself of liability for the negligence of the agencies you thus employ in completing your contract, will be unavailing to you and void. Such a limitation would be void as against public policy, independent of the Statute. In Lockwood vs. R. R. Company and other cases decided by this Court it has been held that it was

against public policy to permit a carrier to exempt himself from liability from the *consequences of negligence of his agents or servants*. Now, whose servant and agent was the Wabash Company in the transportation of these goods? Confessedly the agent and servant of the plaintiff in error. It was the receiver of the M., K. & T. R'y Company that employed and paid the Wabash for its services and employed them to complete its undertaking. The Wabash Railroad was not the agent of these shippers. It had no contract or agreement or even bill of lading with the shipper. Defendants in error looked alone to the receiver of the M., K. & T. to do whatever was necessary to be done to deliver these cattle at the Union Stock Yards at Chicago, as it had agreed to do, with diligence and dispatch, and without delay. This was the measure of their agreement. No more. Nothing less. But plaintiff in error argues that it was not by law bound to become a carrier over other roads than its own, and is not, by law, made a common carrier over other roads than its own, and, therefore, contends that it may agree to carry over other roads and avoid liability for the negligence of the agents it employs for the completion of its contract and undertaking, and, therefore, may *avoid liability for the negligence of the other transportation companies by limiting liability to its own road*.

The answer to this argument, seems to be this:—

"True, you are not, in contemplation of law, a carrier beyond your line, and the law holds you only to the duty to carry goods over your own line and there deliver to the connecting carrier to complete the shipment to point of destination, but, the law *does not prevent you from undertaking to become a*

carrier beyond your own line, and you may therefore enter into an agreement by which you secure from the shippers the right to transport their goods *beyond* the terminus of your road *or over other roads* and over intervening carriers, to point of ultimate destination, and, by your contract, you may divest him of the right to make any other agreement with other roads. But, if you elect, as in case at bar, to contract to carry the goods over the line of other roads and enter into a solemn obligation and undertaking to do so, have you not, by this very election and agreement undertaken *the duty of a common carrier beyond your road?* And do not the same considerations of public policy now bind you to perform your additional undertaking, without negligence, over such other roads which bound you in the first instance over your own road?

In the first instance you are by law, bound to carry over your own road, which makes you a common carrier on your own line, though it may extend through many states. Where you voluntarily contract to carry over other lines, though they may extend into other states, you have voluntarily taken upon yourself, the occupation of a common carrier over other lines than your own.

The law will not permit you to enlarge the scope of your employment as a common carrier, and at the same time avoid the responsibility incident to the occupation you assume. The measure of your liability will not be relaxed when the scope of your employment is enlarged. If such rule is established and sanctioned by the Courts it will render it far more profitable for a common carrier to agree and bind itself to become a carrier over other lines than over its own. Under such a rule of law

common carriers would no longer agree to ship only to the end of their own road, but would, in all instances, enter into a contract and agreement, to ship and deliver the goods to point of ultimate destination. Any little belt line in the suburbs of a city, or miniature transfer or transportation company, would agree to ship goods to the ends of the earth, and divest the owners of all right or dominion over the goods, and be liable for nothing not occurring on their own road, however gross, or culpable, or irresponsible the agents they employed to complete their undertaking. Such, we say, would be the result of such a rule of liability. No, the law rather says to common carriers: "Your undifeasible liability for negligence is coextensive with your duty, and obligation of carriage, whether that duty arises from law, or whether you assume the duty by contract. If you, by contract, enlarge your duty and undertaking of carriage beyond your line, the law, which requires you to perform the duty *without negligence*, will follow you in your enlarged undertaking. If you employ other carriers to complete your expanded duty and self-enlarged obligation, they are your agents and not the agents of the shipper, and you can, in such instance, no more relieve yourself from the liability for their *negligence*, than you could relieve yourself from the negligence of your servant on your own road. So, at least, the Supreme Court of Missouri, had held, before the Statute was enacted. The effect of the Statute in question seems only to prevent the Court from relaxing this, their common law rule of liability as previously declared by that Court. In the recently decided case of Solen vs. Ry. Company, 69 Iowa, 490, cited by the Supreme Court of Missouri as a warrant for its authority in

this case, and, more recently, approved by this Court in 169 U. S., 133, in which it was held that, "A State Statute prohibiting contracts to exempt a Railroad Company from liability of a common carrier, is not, in any just sense, a regulation of commerce, or void, as to interstate business."

Mark you, the Missouri Court deals with the subject as a *through contract* by which the plaintiff in error *becomes carrier throughout the entire distance*. We trust we have been able in our several brief arguments to make our view of the case understood, and in some measure at least, become an aid to this court in understanding the position of the Missouri Supreme Court.

The rule of liability is wholesome and just, and works neither inconvenience nor hardship on the carrier, which by its traffic arrangements with the immediate carriers thus employed by it to complete its contract, is amply protected against loss or liability on account of their negligence. While on the other hand, if the shipper is left to grope in the dark and ferret out which particular road is delinquent, and that, too, without any of the facilities which the carrier has to ascertain these facts, he would be powerless, in the first instance, to locate the offending culprit agent of the original contracting carrier; and, in the second instance, if fortunate in this regard, might, and in many instances would be, compelled to maintain his suit (conceding there would be such privity of contract as would support his action) in a foreign state, remote from home and under such circumstances as would make it more profitable for him to suffer his wrong to go unredressed, than to pursue abroad such expensive and doubtful redress.

This court has often taken occasion to remark, notably in Lockwood vs. Co., supra, and to comment upon the wretched inequality that exists between these corporations and the shipper, and to point out the easy facility and the superior advantages the carrier has in gaining terms and contracts most favorable to itself. If, therefore, under color or pretense of this and like Statutes being in violation of the Federal Constitution, or in violation of the Interstate Commerce law, the carrier may strike down such a regulation as the Statutes of Missouri, and thereby secure the sanction of this, the highest Court in the land, permitting it to enlarge its obligation of carriage over other roads, and avoid all liability therefor, by a clause in the contract, limiting liability to its own road, after it has delivered the goods to the connecting carrier, then, indeed, the shipper will be at the mercy of the carrier, and the carrier thereby secure largely extended obligations and advantageous contracts without any corresponding liability.

We do not believe the Court can sanction or approve such a rule of liability.

Respectfully submitted,

J. H. RODES.